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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 131

FLOYD FITZSIMMONS,

Petitioner and Appellant below,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

EUGENE L. GAREY,
WM. HENRY GALLAGHER,
Counsel for Petitioner.

GAREY & GAREY,
63 Wall Street,
New York 5, N. Y.,

WM. HENRY GALLAGHER,
3005 Barlum Tower,
Detroit 26, Mich.,

Attorneys for Petitioner.

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ARGUMENT:

POINT I—The widespread publicity attendant upon the murder of Senator Hooper, accompanied by the published inflammatory statements of the special prosecutor and of the grand jury, tending to instil in the public mind the belief that petitioner was responsible for such murder, required a granting of the motions for a continuance. The denial thereof constituted a deprivation of due process of law 19

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

Statement of the Matter Involved

As the matter involved falls into three categories, the facts dealing with each will be treated separately.

I

On December 6, 1944, Hon. Leland W. Carr, a Circuit Judge of Ingham County, Michigan, acting as a so-called one-man grand jury (§17217 *et seq.*, Comp. Laws, Mich.

1929), after taking testimony at secret hearings, issued a warrant charging that approximately four years prior thereto, to wit, on February 20, 1941, petitioner, a citizen of the United States, had offered and promised a bribe to a member of the Michigan House of Representatives.

After petitioner's arrest thereunder, the preliminary examination required under Michigan laws (§17193 *et seq.*, Comp. Laws, 1929) was conducted by the same Judge Carr, then sitting as an examining magistrate.* At the conclusion thereof petitioner was bound over for trial in the Circuit Court of Ingham County.

On January 8, 1945, an information was filed in the Circuit Court of Ingham County, charging that petitioner, on February 20, 1941, had offered and promised a bribe to Gail Handy, a member of the House of Representatives of the State of Michigan (R 4-6).†

On the same day, January 8, 1945, petitioner was arraigned upon the information (R 7) and trial was fixed for January 29, 1945 (R 24).

Three days later, on January 11, 1945, Warren G. Hooper, a State Senator of Michigan, was found shot to death in his car on a public highway. This occurrence was headlined in every daily newspaper in Michigan and broadcast on the radio. Pictures which had been taken at the scene of the crime were published and stories of the continued search for the alleged murderers occupied front pages of daily newspapers in Michigan, right up to the date petitioner was forced to proceed to trial. Newspapers carried stories and quotations attributed to the

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* Since the time of petitioner's preliminary examination before Judge Carr, who had issued the warrant and who sat as examining magistrate, the Michigan statute (§ 17218, Comp. Laws, 1929) was amended so as to prohibit a judge from sitting as an examining magistrate and from passing upon certain motions in any matter in which he had acted as the one-man grand jury.

† Numbers in parentheses, unless otherwise indicated, where preceded by "R" are to the principal record below; where preceded by "SR" are to the supplemental record below; and where preceded by "AR" are to the additional record in this Court.

so-called one-man grand jury and to the special prosecutor which clearly implied that petitioner was in some manner connected with Hooper's murder.

Even if the special prosecutor and the one-man grand jury had had nothing to do with the publication of the rumors that petitioner was responsible for Hooper's murder, "natural, inherent, and fundamental principles of fairness"* clearly required that petitioner should not be rushed to trial on a four-year-old bribery charge at the very moment when he stood falsely charged in the eyes of the people of Michigan with the crime of cold-blooded murder for the purpose of silencing the alleged principal witness against him.

The continual bombardment of the public mind by radio broadcasts and the inevitable effect of the sensational newspaper campaign may readily be visualized from the photoprints of newspaper articles which are included in the record (R 12, 22).

Because of the prejudicial effect of the widespread publicity attendant upon the murder of Senator Hooper, containing the inferences and charges that petitioner was responsible for or in some manner connected therewith, petitioner promptly moved, on January 17, 1945, for a continuance of the trial. Petitioner contended that a fair and impartial trial, as guaranteed him by the Constitution of the United States, could not then be had (R 8-12).

The aforesaid motion for a continuance was also heard by Judge Carr, the so-called one-man grand jury, and denied by him (R 16).

A supplemental motion for a continuance was filed and argued on January 29, 1945, before the trial judge (R 20-23).

In denying the supplemental motion for a continuance because of the prejudicial effect of the widespread publicity aforesaid, the trial court, after stating that the motion had been ruled upon once by Judge Carr and that he felt,

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Per Roberts, *J.*, in *Betts* v. *Brady*, 316 U. S. 455, at 464 (1942).

therefore, that there was nothing else for him to do but to deny the motion, said (R 31):

> "I think that the people at the present time do not always take so seriously what they see in the paper and do not pay any attention to it."

While, perhaps, the trial court's statement may have had legitimate applicability to some petty news item, it clearly could not have been applicable to the shocking and cold-blooded murder of a State Senator; *a sensational and unprecedented offer of a $25,000 reward by the State legislature ("the greatest reward in Michigan's history")*; a supplemental offer of a $5,000 reward by one of Michigan's leading newspapers (the committee to determine conflicting claims to consist of the Governor, the Attorney General, and the Chief Justice of the Michigan Supreme Court); an order by the Governor that "all the resources of the State" be thrown into the hunt for the slayer; sensational statements by the special prosecutor and the so-called one-man grand jury calculated to instil in the public mind a belief that *this petitioner* was one of Senator Hooper's murderers,* lurid photographs of the murdered Senator,

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* The Detroit Free Press of January 12, 1945, in an "EXTRA" edition, carried the eight-column banner headline: "GRAFT WITNESS SLAIN", and continued thus in a first-page eight-column spread: "Kim Sigler, special prosecutor for the State Graft Grand Jury, said at Lansing: 'Hooper was the principal witness against Frank McKay, Floyd Fitzsimmons and William Green. He had given a complete confession to the grand jury.' * * * Sigler said that Hooper had been offered police protection since his appearance before the Grand Jury but had declined it. * * * Asked if the murder of Hooper would make such protection automatic for Grand Jury figures, Sigler replied: 'You can bet your bottom dollar it will.'" Another article in the same issue reported: "Hitherto unknown to have any connection with the McKay-Green-Fitzsimmons indictment, Senator Warren G. Hooper, whose death shocked the State, was really a key witness. Said Kim Sigler, special prosecutor: 'Hooper was the principal witness in the case against McKay and Fitzsimmons. That I can say now.'"

The Detroit News of January 12, 1945, in its City Edition, quoted Kim Sigler as saying: "He [Hooper] was to be our chief witness. His death is a serious blow to our case against McKay and the

petitioner, **of the murdered Senator's "modest his bereaved widow and children (in many poses, g funeral scenes), of the partially burned murder the special prosecutor and his special staff of ators at work (in dozens of poses), of bullet the murdered man's hat and car window, of wit- eing interviewed and of witnesses inspecting vari- ects associated with the murder (including toys**

[FOOTNOTE CONTINUED]

dentified later in the article as Green and Fitzsimmons]." nnounced that hereafter key grand jury witnesses would be whether they asked for protection or not." Sigler "de- at the grand jury motive was the most obvious one, and as proceeding on the theory the slayer wanted Hooper out y because of his grand jury role."

etroit News of January 12, 1945, in its Final Edition, car- eight-column banner double headline: "M'KAY'S ACCUSER BALK JURY—SIGLER," and continued thus on its first Kim Sigler, special grand jury prosecutor, announced that ircuit Judge Leland W. Carr were dropping all other work nine if this murder is a conspiracy to obstruct justice by who wanted a key grand jury witness out of the way.' 'We murder is a conspiracy to obstruct justice,' Sigler added."

etroit Times of January 12, 1945, describing "the tragedy k the entire state," reported: "Special Prosecutor Kim ated last night that 'Senator Hooper was the principal wit- nst McKay and Fitzsimmons. That is all I can say now.' xamination of Fitzsimmons Dec. 14, Rep. Gail Handy, Ber- nty farmer, testified that the Benton Harbor lobbyist came n the floor of the House in 1941 and offered $500 for his to get the racing bill killed in the state affairs committee."

etroit Free Press of January 13, 1945, in a first-page article "Sigler Calls Death Blow at Inquiry", reported: "That er would have a crippling effect upon the grand jury's case he three defendants was made known by Sigler shortly after body was discovered. Sigler termed the murder 'a de- ttempt to obstruct justice.' * * * Sigler said that Hooper's uld nullify his grand jury testimony. Statements made to against McKay, Fitzsimmons and Green cannot be used at mination Sigler said, because the defendants would have no or cross-examination. * * * One immediate consequence of ler of the grand jury's vital witness was the order for the ry's investigators to resume carrying guns. A few weeks aring 'we aren't dealing with gangsters,' Sigler ordered the tors to stop carrying weapons. They were buckled on

intended for the murdered man's children), of numerous *other persons who had been associated with the one-man grand jury investigation and who had met death "under mysterious circumstances" during recent months;* photographs, maps, diagrams, "reconstructions", etc., of the murder road, site, scene, etc.

All of the foregoing appeared,—not on an isolated occasion, on an obscure inner page,—but daily (including the morning of petitioner's trial), displacing even the war

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[FOOTNOTE CONTINUED]

again Friday and Sgt. Leo Van Conant, head of the grand jury detail, said that a constant guard over Sigler will be maintained."

The Detroit Times of January 13, 1945, carried the eight-column banner double headline: "HOOPER'S 'CONFESSION' CLUES TRACED," and reported thus on its first page: "Hooper's home was placed under guard and, in Lansing, Grand Jury Judge Leland W. Carr said officers would be assigned other grand jury witnesses 'whenever necessary.' He refused to say whether he would accept a guard for himself, as friends urged. Carr declared: 'The killing, one of the most vicious in Michigan crimes, will only spur our people onward and arouse Michigan's law-abiding citizens.'"

The Detroit News of January 13, 1945, reported on its first page: "In all the speculation, Kim Sigler, special Carr graft grand jury prosecutor, held firmly to his statement that he was convinced the killing was intended to silence Hooper as a grand jury witness."

The Detroit Free Press of January 14, 1945, under the first-page eight-column banner headline, "HOW HOOPER WAS MURDERED," had an eight-column news spread reading, in part, as follows: "Senator Hooper was 'hot.' * * * (Special Prosecutor Kim Sigler said, 'his murder was a deliberate attempt to obstruct justice.') * * * Sigler said, '* * * We'll keep the public advised on our progress, for the entire state has been aroused.' In announcing that guards would be assigned future vital grand jury witnesses, Judge Leland W. Carr said, 'This killing, one of the most vicious in Michigan's crimes, will only spur our people onward and arouse Michigan's law-abiding citizens.'"

The Detroit Times of January 14, 1945, describing the murder as "a crime unequalled in its [Michigan's] history," quoted Judge Carr as saying, "This terrible, terrible thing cannot stop the work of the grand jury."

The Detroit Times of January 15, 1945, in a first-page spread describing "the greatest manhunt in Michigan history," reported: "Convinced that State Senator Warren G. Hooper was murdered because of a sensational legislative graft story he told the Lansing grand jury, * * * because he knows now that the grand jury may be dealing with men who will not stop short of murder, the prosecutor insisted upon proceeding with the examinations today so that

news from the first page, with innumerable editorials and feature articles thereon, throughout the various newspapers of the State. Every one of Michigan's newspapers characterized the crime as the most shocking and sensational in the entire history of the State.

When the extent of the Hooper murder publicity and of petitioner's alleged connection therewith is considered, to state, as the trial court did, that jurors "at the present time do not always take so seriously what they see in the papers" is a hollow mockery. The deliberate campaign to prejudice the petitioner, as established by the record herein, created prejudice *per se* which, if it ever could have been eradicated, could have been eradicated only by the passage of time.

Considering the responsibility of the one-man grand jury and of the special prosecutor for having created in the public mind a belief that petitioner was guilty of the murder of the alleged principal witness against him, the denial of a reasonable continuance sought to enable the flames of public passion in some degree to subside does not fit into the category of mere error in the exercise of judicial

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[FOOTNOTE CONTINUED]

the testimony of his witnesses can be perpetuated. * * * 'Hereafter, examinations will follow indictments as quickly as possible,' he [Sigler] said."

The Detroit Free Press of January 15, 1945, reported: "Sigler reiterated that 'in my own personal opinion, Hooper was killed because he was the star state witness.'"

The Detroit Free Press of January 17, 1945, reported: "The Carr-Sigler Grand Jury not only termed his [Hooper's] killing an attempt to frustrate its work, but pointed out that Hooper was the key to impending cases."

The Detroit Times of January 28, 1945, stated: "Trial of Floyd Fitzsimmons, Benton Harbor fight promoter, on a bribery charge will open in Mason Monday, with Special Prosecutor Sigler using the courtroom to direct both the state's case and the unrelenting search for the killers of Senator Hooper."

The Detroit Free Press of January 29, 1945, under the headline, "Fitzsimmons Goes on Trial Today on Bribery Charges," stated: "Special Prosecutor Kim Sigler temporarily will leave the investigation of the murder of State Senator Warren G. Hooper to prosecute Fitzsimmons. Hooper, principal witness against McKay, Fitzsimmons and Green, was found shot to death Jan. 11."

discretion, but rather was a step in a deliberate plan to place this petitioner on trial on a bribery charge while under the aura of a public belief that he was guilty of murder. The circumstances here are such that they constitute a violation of "fundamental ideas of fair play and justice in civilized society." *

The special prosecutor's successful opposition to any continuance of the trial, notwithstanding the circumstances aforesaid, did not deter him in his plan of further prejudicing petitioner before the jury.

If it could be said that the jurors could have eliminated from their minds the vicious inference that petitioner was connected with Hooper's murder, the special prosecutor saw to it that their minds were refreshed, by deliberately and improperly injecting Senator Hooper's name in a series of improper questions during the cross-examination of petitioner (R 125-127).

Lest the jury might not have identified petitioner as the same Fitzsimmons whom the special prosecutor had charged in the press with having been connected with Senator Hooper's murder, the special prosecutor, during cross-examination of petitioner, was permitted to interrogate petitioner as to the number of times petitioner had seen Senator Hooper, and the occasions for such visits. Then, as a climax to this improper line of cross-examination, the special prosecutor was permitted to ask a series of questions indicating that petitioner had, shortly before the murder, threatened Hooper's life (R 125-127).

Senator Hooper was never intended to be called as a witness in this case against petitioner. His name was not endorsed on the information which had been filed three days before his death, which endorsement is required under Michigan law (§17254, Comp. Laws, 1929). It is apparent, therefore, that the sole motive in injecting Hooper's name was to prejudice petitioner before the jury and thus deprive him of a fair and impartial trial.

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* *Per* Rutledge, *J.*, in *In re Oliver*, 333 U. S. 257, 282 (1948).

II

The warrant issued by the one-man grand jury charged the offense as having been committed on February 20, 1941.

At the preliminary examination on such warrant, Gail Handy on seven separate occasions testified that the alleged offense occurred on February 20, 1941, and with meticulous detail fixed the day of the week as a Thursday,* thus giving not only the date but also the particular day of the week of the alleged offense. He also fixed the precise hour of that day and date on which the offense allegedly occurred (R 67-68, 103).

At such examination, Bert J. Storey, another witness for the People, likewise fixed February 20, 1941, as the date he was told by Handy about the alleged occurrence (R 81).

Following such preliminary examination, on January 8, 1945, an information was filed in the Circuit Court of Ingham County charging petitioner with having committed the alleged offense on February 20, 1941 (R 4-6).

Michigan statutes require a defendant to serve notice of intention to rely on an alibi. On January 17, 1945, petitioner, in accordance with the statute, duly served upon the prosecution a notice of intention to rely upon the defense of an alibi, to wit, that at no time on February 20, 1941, the date of the alleged offense, was he in the City of Lansing, wherein the alleged offense was charged to have occurred, but that throughout said day he was in the City of Grand Rapids; the names of six witnesses whom petitioner intended to call to establish such alibi were listed (R 17).

On January 29, 1945, the trial was commenced, despite petitioner's protest that he was being deprived of his right to a fair trial by reason of the manner in which the public mind had been inflamed against him (see "I", *supra*).

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* February 20, 1941, was a Thursday.

During the selection of the jury the special prosecutor made a number of references to the defense of alibi and requested the court to, and the court did, examine each of the prospective jurors with respect to petitioner's alibi and concerning the witnesses whom petitioner had announced he intended to rely upon to establish the same (R 31-33; SR 63-64, 81-82, 119-120, 124-125, 137). As shall shortly appear, the special prosecutor did this although he at that time knew—and for one week prior thereto had known—that he was going to endeavor to establish that the offense was committed on a different date. The only conceivable effect of this indefensible procedure was to lead the jurors, who had been told that petitioner had an alibi and would produce witnesses to substantiate the same, to believe that petitioner, by not calling such witnesses, had been pretending a defense which he could not establish.

After the selection of the jury had been completed, the special prosecutor made his opening statement to the jury. Just prior to the conclusion thereof, he disclosed for the first time that the People did not intend to prove that the alleged crime had been committed on Thursday, February 20, 1941, the date charged in the warrant—the date charged in the information—the date testified to at the preliminary examination—but intended to prove instead that the alleged offense had occurred on Tuesday, February 18, 1941 (R 42-45).

Testimony subsequently taken upon the trial revealed that, after petitioner had served his notice of alibi and *because of the notice of alibi* (R 77), the witnesses for the People re-examined their proposed testimony on the subject and concluded that the alleged offense must have occurred on a date different than that charged in the information and previously testified to by them (R 42, 68, 76-77, 81, 83, 91-92). This determination to change the date charged in the information was made on January 22, 1945,—one week before the commencement of the trial,—and one week before the special prosecutor caused the court

to examine the prospective jurors concerning the proposed defense of alibi as to the date charged in the information.

Petitioner resided at Benton Harbor, Michigan (R 102), a distance of about 100 miles from Mason, Michigan, where the trial was being conducted. Up to the moment in the prosecutor's opening when he disclosed for the first time that there would be a change in the date of the alleged bribe offer, petitioner had been confidently prepared to prove an unassailable alibi.

In effect, petitioner, while supposedly on trial on a charge which he was fully prepared to meet, was suddenly and without one moment's notice placed on trial on a charge which he was totally unprepared to meet.

It is petitioner's contention that the change in the date of the commission of the alleged offense, made under the circumstances aforesaid, was a calculated step in the plan of the special prosecutor to deprive petitioner of a fair and impartial trial by denying him reasonable notice of the charge against him and an opportunity to prepare to be heard in his defense.

Immediately following the special prosecutor's disclosure, in his opening statement, of his intention to change the date charged as the date of commission of the alleged offense, petitioner claimed surprise and moved for an adjournment in order to enable him to prepare his defense to the new charge; the motion was promptly denied and petitioner forced to proceed forthwith to trial (R 45-46).

When the People rested, the special prosecutor moved to amend the information to conform to the proofs in regard to the changed date (R 96). Thereupon petitioner, claiming prejudice and surprise, again moved for a continuance to enable him properly to prepare his defense, which motion the trial court denied (R 98-102).

At the conclusion of the evidence petitioner again moved for a continuance and for a mistrial on the ground that a fair trial under the due process clause of the United States Constitution had been denied to him because, *inter alia*, of the change of date, which motion also was denied (R 154-156).

Petitioner's several motions for a continuance, as aforesaid, were denied notwithstanding that §17290 of the Compiled Laws of Michigan provided that, upon amendment "to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause, unless it shall clearly appear from the whole proceedings that he has not been MISLED or prejudiced * * *."

From the facts aforesaid, it is apparent that petitioner was not only prejudiced but actually misled.

III

Upon the trial, Judge Carr, the one-man grand jury, was called by the special prosecutor as a so-called rebuttal witness, for the ostensible purpose of denying certain testimony given by Mr. Rushton, formerly Attorney General of Michigan. Mr. Rushton had been called as a witness for the defense and his testimony on direct examination was limited to establishing that Mr. Handy, who had previously testified before him and whose testimony was recorded stenographically, had given testimony at variance with his testimony at the examination and at the trial (R 127-129).

Judge Carr's so-called rebuttal testimony (R 150-153) was given, not in rebuttal of anything testified to by Mr. Rushton on direct examination, but in so-called rebuttal on a purely collateral issue developed by the special prosecutor on cross-examination (R 128-129).

As such, Judge Carr's testimony, admitted over strenuous objection (R 151), was clearly inadmissible under universally accepted rules of evidence.

Judge Carr was not merely the senior Circuit Judge of the County where the trial was held, but was undoubtedly the most widely known Circuit Judge of Michigan, having served as Circuit Judge of Ingham County for upwards of twenty-four years (R 150).

He was the most active and assiduous of the so-called one-man grand juries, and his activities as such received more publicity than those of any other investigator in that State.

It is petitioner's contention that the calling of Judge Carr as a so-called rebuttal witness—the very last witness to appear before the jury—was a calculated step in the deliberate plan of the special prosecutor to deprive petitioner of a fair and impartial trial by violating all rules of evidence and of law which stood in the way of his securing a conviction of this petitioner. A trial so conducted does not constitute due process of law.

Jurisdictional Statement

1. The order of the Supreme Court of the State of Michigan affirming the judgment of conviction was entered on February 16, 1948. Application for rehearing was denied on April 5, 1948.

2. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code [28 U. S. C. §344] and subdivision (5a) of Rule 38 of this Court.

3. The denial of petitioner's several motions for a continuance of the trial, for a mistrial, and for a new trial, and the prejudicial manner in which the trial was conducted, deprived petitioner of a fair and impartial trial, and constituted a denial of due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether it constituted a denial of due process to deny petitioner's several motions for a continuance of the trial, for a mistrial, and for a new trial, and to conduct the trial in the unfair and partial manner in which it was conducted.

How Question Raised in the Michigan Courts

1. The federal question of denial of due process with respect to "I", *supra,* was raised in the Circuit Court, before the date set for trial, by motion for a continuance of the trial (R 8-9), and again at the outset of the trial and before selection of the jury, by a supplemental motion for a continuance of the trial (R 20, 25-26, 30).

2. The federal question of denial of due process with respect to "II" and "III", *supra,* was raised in the trial court by motions for a continuance of the trial (R 44-45, 99-100, 154), by motion for a mistrial (R 154-155), and by motion for a new trial (R 188-190, 196-200).

3. The federal question of denial of due process with respect to "I", "II" and "III", *supra,* was raised in the Supreme Court of the State of Michigan by application for leave to claim a general appeal (R 206-207, 211, 213), by assignment of errors (R 234-235, 239, 241), by appellant's brief (pp. 1-3, 8-59, 100-115), and by application for a rehearing (pp. 2-4) and brief in support thereof (pp. 5-13, 24-26).

Reason Relied Upon for Allowance of Writ

We recognize that the power which resides in the States to regulate procedure in their own courts and the discretion vested in the trial courts of the States to govern the procedure and conduct of trials had therein are not normally subjected to review in this Court. Petitioner submits, however, that where such power and such discretion have been, as here, deliberately misapplied and misused as part of a plan to deprive petitioner, a citizen of the United States, of his right to a fair and impartial trial guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, a substantial federal question is presented.

Prayer for Writ

Wherefore your petitioner prays that a writ of certiorari issue out of and under the seal of this Court, directed to the Supreme Court of the State of Michigan, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said court had in the case numbered and entitled on its docket No. 43,097, The People of the State of Michigan, Plaintiff and Appellee, v. Floyd Fitzsimmons, Defendant and Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution and statutes of the United States; and that the judgment herein of said Supreme Court of the State of Michigan be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: June 25, 1948.

Respectfully submitted,

EUGENE L. GAREY,
WM. HENRY GALLAGHER,
Counsel for Petitioner.

GAREY & GAREY,
63 Wall Street,
New York 5, N. Y.,

WM. HENRY GALLAGHER,
3005 Barlum Tower,
Detroit 26, Mich.,

Attorneys for Petitioner.

IN THE

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OCTOBER TERM, 1948

No.

FLOYD FITZSIMMONS,

Petitioner and Appellant below,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

No formal opinion was rendered in the Circuit Court on the denial of the first motion for a continuance on the ground of the Hooper murder publicity; the court appears to have dictated an opinion on the record (R 16), but the record of this motion was not included in the record below.

No formal opinion was rendered by the trial court on the denial of the supplemental motion for a continuance on the same ground; the court's remarks upon its disposition of the motion are set forth in the record (R 31).

No formal opinion was rendered by the trial court on the denial of the first or second motions for a continuance on the ground of surprise due to the change in date; the

court's remarks upon its disposition of these motions are set forth in the record (R 45-46, 101-102).

No opinion was rendered in the trial court on the denial of the third motion for a continuance on the same ground and for a mistrial.

The opinion rendered by the trial court on the denial of the motion for a new trial is printed in full (R 200-202).

The opinion rendered by the Supreme Court of the State of Michigan in affirming the judgment of conviction is printed in full (AR 1-13). It is reported in 320 Mich. 116 and in 30 N. W. 2d 801.

No opinion was rendered by the Supreme Court of the State of Michigan in denying the application for a rehearing.

Jurisdiction

The "Jurisdictional Statement" (p. 13) in the petition, *supra,* is hereby adopted and made a part of this brief.

Statement of the Case

The "Statement of the Matter Involved" (pp. 1-13) in the petition, *supra,* is hereby adopted and made a part of this brief.

Specification of Error

The Michigan Supreme Court, by affirming the judgment of conviction and the orders denying petitioner's several motions for a continuance of the trial, for a mistrial and for a new trial, deprived petitioner of a fair and impartial trial and denied him due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

POINT I

The widespread publicity attendant upon the murder of Senator Hooper, accompanied by the published inflammatory statements of the special prosecutor and of the grand jury, tending to instil in the public mind the belief that petitioner was responsible for such murder, required a granting of the motions for a continuance. The denial thereof constituted a deprivation of due process of law.

No case precisely similar to that at bar has been found in the reports. There are, of course, the well-known instances in which this Court has declared that a conviction resulting from mob pressure cannot stand. *Moore* v. *Dempsey,* 261 U. S. 86 (1923); *Frank* v. *Mangum,* 237 U. S. 309 (1915).

But those cases are in no sense as strong as the instant one, where public prejudice against the accused had been deliberately fanned by the special prosecutor. Since it has been held that mob pressure alone may render a trial void, it follows *a fortiori* that there is a denial of due process where an overwhelming public prejudice has been created by the deliberate acts of the prosecution itself. *Cf. Mooney* v. *Holohan,* 294 U. S. 103 (1935).

The contention conventionally advanced in support of the judgment below, that continuances of a trial always rest in the discretion of the trial court, is wholly inapplicable to the present situation. Paraphrasing the opening sentence in the dissenting opinion of Justices Douglas, Black, Murphy and Rutledge in *Bute* v. *Illinois,* 333 U. S. 640 (1948), it may here appropriately be asked:

> Of what value is the constitutional guaranty of a fair trial if the denial of a continuance essential to

> obviate the effects of a calculated scheme of the public prosecutor to destroy a fair trial is held to be a proper exercise of discretion by the trial court?

Considering the fact that a violent public prejudice against petitioner was created and nurtured by the special prosecutor, in violation of "fundamental ideas of fair play and justice in civilized society," * "natural, inherent, and fundamental principles of fairness" † clearly required that petitioner should not be rushed to trial on a four-year-old bribery charge at the very moment when he stood charged in the eyes of the people of an entire state with the odious crime of murder for the purpose of silencing the principal witness against him.

A trial conducted under the influence of a violent public prejudice created and fanned to a consuming flame by the public prosecutor, cannot be said to be "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." **

Probably the most direct exposition of this subject is to be found in the opinion of Mr. Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S. 97, at 116 (1934), where, writing for this Court, he stated:

> "Due process of law requires that the proceedings shall be fair."

Equally succinct is the clear enunciation of principle by Mr. Justice Roberts in *Lisenba* v. *California*, 314 U. S. 219, at 236 (1941), where he stated:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

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* *Per* Rutledge, *J.*, in *In re Oliver*, 333 U. S. 257, at 282 (1948).

† *Per* Roberts, *J.*, in *Betts* v. *Brady*, 316 U. S. 455, at 464 (1942).

** *Per* Van Devanter, *J.*, in *Hebert* v. *Louisiana*, 272 U. S. 312, at 316 (1926).

Principles of "fundamental fairness" are patently violated when a public prosecutor creates public prejudice of the most extreme character against a defendant whom he is about to bring to trial. Under such circumstances, the concept that continuances of a trial are merely an incidental step in trial procedure, which must be left to the discretion of the trial court, ceases to have any applicability.

The opinion of the Michigan Supreme Court correlated the circulation statistics of the various newspapers (photoprints wherefrom are included in the record below) with the facts concerning the residences of the trial jurors, and inferentially concluded therefrom that it was *improbable* that any of the trial jurors had read any of the inflammatory articles (AR 3). This *tour de force* establishes only the versatility of that court. As was pointed out on the application for a rehearing (pp. 6-9), the record reveals that, regardless of *probabilities,* ten of the twelve jurors each admitted to reading one of such newspapers (SR 17-19, 89, 100, 110-111, 134, 143).

But apart from the fallacy of the Michigan Supreme Court's effort to prove the immunization of the trial jurors herein to the existing prejudice, justice requires this Court to recognize the fact that the passions of jurors may be inflamed to such an extent that they will deny their prejudice. The case at bar is one where such denial merely proves the existence of that which is denied. This was clearly an instance of prejudice *per se.*

Due process of law required that a reasonable continuance be allowed to permit the prejudicial effect of the widespread publicity attendant upon Senator Hooper's murder to subside.

POINT II

The refusal to grant petitioner a reasonable continuance where the charge against him was altered after a jury had been selected and interrogated with respect to his alibi to the original charge, constituted a denial of due process.

Twelve days before the trial commenced, petitioner, in accordance with Michigan statutes, served and filed a notice of intention to rely on an alibi, listing the names of six witnesses whom petitioner intended to call to establish such alibi. Thereupon the prosecution began to re-examine its prospective proof and to mend its fences.

Five days after petitioner served such notice of alibi, being one week before the trial began, the prosecution came to the conclusion that it could not substantiate the date charged in the warrant—the date testified to at the examination and charged in the information—and therefore determined to alter the date of the alleged offense.

The prosecution did not, however, at that time serve any notice of intention to alter the charge. Even a week later—when the case was called for trial—the prosecution made no mention of its intention to alter the charge.

The prosecution did not merely abstain from taking steps which would have placed petitioner, who resided about 100 miles from the place of trial, on his guard against unwarranted reliance on his defense of alibi. It took affirmative steps to mislead petitioner and to take advantage of its change of position by having it appear to the jury that petitioner was pretending to a defense which he could not establish.

With the week-old knowledge that it intended to alter the date charged in the information, the prosecution nevertheless caused the court to proceed to examine each of the prospective jurors concerning the proposed alibi. Each of the prospective jurors was examined as to the names

of the proposed alibi witnesses and each, at the prosecutor's request, was given to understand that the essence of petitioner's defense was to be that of alibi.

Only after this incredible farce had been carried through to a conclusion—and jurors were advised that one of their functions was to evaluate the defense of alibi—did the prosecution, at the conclusion of its opening statement, reveal for the first time that the crime was to be charged to have been committed on a different date than that originally charged, thereby rendering valueless the defense of alibi.

Considering that petitioner resided at a distance of more than 100 miles from the place of trial and could not, in the midst of the trial, begin to prepare his defense to the altered charge, and considering that petitioner had been deliberately misled and deceived by the special prosecutor into thinking that he need not prepare as to any date other than the one charged in the warrant—the date testified to under oath at the preliminary examination and charged in the information—it is submitted that this case falls squarely within the holdings of this Court that a person accused of crime must be given notice of the charge and an adequate opportunity to prepare his defense.

In *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934), both the majority opinion of this Court written by Mr. Justice Cardozo and the minority opinion written by Mr. Justice Roberts recognized the foregoing proposition.

Mr. Justice Cardozo stated:

> "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." (at 105)
>
> "The law * * * is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend." (at 122)

Mr. Justice Roberts stated:

> "It is fundamental that there can be no due process without reasonable notice." (at 127)
>
> "Whatever the form or method of procedure adopted, they [the States] remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing." (at 128)
>
> "Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just." (at 137)

In *In re Oliver*, 333 U. S. 257, at 273 (1948), Mr. Justice Black, writing for this Court, stated:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence."

And in *Carter* v. *Illinois*, 329 U. S. 173, at 174-175 (1946), Mr. Justice Frankfurter, writing for this Court, stated:

> "Inherent in the notion of fairness is ample opportunity to meet an accusation. * * * The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. * * * Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

Significant also is the fact that while the Supreme Court of Michigan, in its opinion (AR 7), referred to and quoted

a portion of §17290 of the Compiled Laws of 1929, it chose to ignore that portion of the same section which specifically entitled petitioner, under the circumstances here, to a reasonable continuance.

The aforesaid section provides that upon amendment to cure a variance between the indictment and the proof,

> "• • • • the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been MISLED or prejudiced by the defect or variance in respect to which the amendment is made • • •." (Emphasis ours)

Upon the facts hereinbefore shown, if it could be argued that petitioner had not been prejudiced, most certainly he had been not only misled, but deliberately misled.

The courts of many jurisdictions have held that where a defendant in a criminal case has given timely notice of intention to rely upon an alibi, and at the trial the date of the occurrence of the alleged offense is changed by the People to the surprise of the defendant, a refusal to grant a reasonable adjournment to enable the defendant to prepare the necessary change in defense is a denial of substantial justice, notwithstanding that time was not of the essence of the offense and that the State statutes permitted amendment of the charge with respect to time.

People v. *Kircher,* 333 Ill. 200, 164 N. E. 150 (1928);
Kid Williams v. *State,* 48 Tex. Cr. 325, 87 S. W. 1155 (1905);
State v. *Singleton,* 169 La. 191, 124 So. 824 (1929);
State v. *Lee,* 63 N. J. L. 474, 43 Atl. 678 (1899);
Commonwealth v. *Neff,* 149 Pa. Super. 513, 27 A. 2d 737 (1942);
Blake v. *State,* 38 Tex. Cr. 377, 43 S. W. 107 (1897);
State v. *Barnhart,* 143 La. 595, 78 So. 975 (1918);
State v. *Wallman,* 31 La. Ann. 146 (1879);
22 C. J. S. 791.

Neither did we below, nor do we here, quarrel with the rule of law that when time is not of the essence of the offense charged, an amendment may be permitted. What we did and do contend is that, when a defendant in a criminal case has given timely notice of intention to rely upon an alibi, and at the trial, the date of the occurrence is changed by the People to the surprise of the defendant, a refusal to grant a reasonable continuance to enable a defendant to prepare the necessary change in defense, is a denial of substantial justice.

We contend further, that the timing of the amendment and the circumstances hereinabove enumerated were calculated steps in a plan on the part of the special prosecutor, which were intended to and which did deprive this petitioner of a fair and impartial trial.

If, as the prosecution contended, petitioner was subjected to no disadvantage by the alteration of the charge after the trial had commenced,—Why did the special prosecutor conceal, until after the trial commenced, his intention to alter the charge, and go to the extent of requesting that the prospective jurors be examined at length as to what he knew, for at least a week before the commencement of the trial, was to become, by his action, a non-existent issue?

The answer is that he desired a conviction at any price. The record herein shows his utter disregard of defendant's right to a fair and impartial trial.

POINT III

Permitting Judge Carr to be called and to testify, ostensibly as a rebuttal witness,—notwithstanding that the defense had adduced no evidence concerning which his testimony could have constituted a rebuttal,—deprived petitioner of a fair and impartial trial and constituted a denial of due process of law.

We fully recognize that the jurisdiction of this Court does not ordinarily extend to the correction of errors resulting from the application by State courts of rules of evidence.

However, the situation here far transcends mere error. Here, we are confronted with a deliberate plan of a special prosecutor to subvert all principles of law and of trial procedure to secure a conviction.

The record is replete with instances thereof. In deference, however, to this Court's expressed desire that, on an application for certiorari, the issues be limited in number, petitioner will discuss only the calling of Judge Carr, the one-man grand jury, as a so-called rebuttal witness.

Herbert J. Rushton, former Attorney General of Michigan, was called as a witness for the defense. His testimony, on direct examination, was limited to certain questions he had asked and the answers thereto made by Mr. Handy when he (Rushton) was Attorney General. The answers made by Handy to Rushton's questions were at variance with Handy's testimony both at the examination and at the trial (R 127-128).

Many collateral issues were gone into by the special prosecutor in his cross-examination of Rushton. The special prosecutor asked Rushton whether he had told Judge Carr of the statement taken by him from Handy, and Rushton testified that he had (R 128-130). After the defense had rested, the special prosecutor called Judge

Carr as a so-called rebuttal witness—his last witness—and asked him:

> "Q. Mr. Rushton, the former Attorney General, has appeared here at this trial and testified under oath that he told you about the Gail Handy matter sometime during the months of September, October or November of 1943. Will you state whether or not that is true?" (R 150)

Over strenuous objection, Judge Carr was permitted to answer that Mr. Rushton's testimony in that respect was untrue (R 151).

Mr. Rushton's testimony on a number of other collateral matters, not gone into on direct examination, was then summarized by the special prosecutor, and Judge Carr was in each instance asked whether Mr. Rushton's testimony in such respect was true. Judge Carr was permitted to characterize such testimony of Mr. Rushton as untrue (R 151-153).

Principles of law established no less firmly in the State of Michigan than elsewhere left no room for doubt that it was reversible error for Judge Carr to be permitted to give so-called rebuttal testimony impeaching or contradicting the testimony elicited from Mr. Rushton during cross-examination on collateral matters.

People v. *Dellabonda,* 265 Mich. 486 (1933);
People v. *Culver,* 280 Mich. 223 (1937);
People v. *Root,* 231 Mich. 239 (1925);
Robertson v. *Hayes,* 261 Mich. 200 (1933);
People v. *Harvey,* 220 Mich. 226 (1922);
People v. *MacCullough,* 281 Mich. 15 (1937);
People v. *Lahnala,* 193 Mich. 144 (1916);
Shannon v. *Jamestown Tp.,* 251 Mich. 597 (1930);
People v. *Cutler,* 197 Mich. 6 (1917);
Mills v. *Warner,* 167 Mich. 619 (1911);
People v. *Rose,* 268 Mich. 529 (1934);
People v. *Wright,* 315 Mich. 81 (1946);

Thomas v. *Byron Tp.*, 168 Mich. 593 (1912);
People v. *Hillhouse*, 80 Mich. 580 (1890);
Driscoll v. *People*, 47 Mich. 413 (1882);
Hamilton v. *People*, 46 Mich. 186 (1881);
Howard v. *Patrick*, 43 Mich. 121 (1880);
Hitchcock v. *Burgett*, 38 Mich. 501 (1878);
Geary v. *People*, 22 Mich. 220 (1871).

The calling of Judge Carr as a so-called rebuttal witness—the very last witness called before the case went to the jury—for the purpose of giving testimony clearly inadmissible under established Michigan law was a deliberate and calculated step in the special prosecutor's plan to deprive petitioner of a fair and impartial trial.

The mere presence of Judge Carr as a witness before a jury composed of citizens of a county where he had sat as a Circuit Judge for upwards of twenty-four years was prejudicial in itself. He had been and was at the time conducting a one-man grand jury investigation in Ingham County. His activities as such had received more publicity than had ever been given to any other investigation in the State. Editorials and special articles lauding him and his work had appeared in the press. It was in this atmosphere and with this background that Judge Carr was called as a witness,—in fact, the very last witness whom the jury heard,—a maneuver, we submit, deliberately planned and effectively carried out for the purpose of prejudicing petitioner.

The harm done to petitioner was magnified by permitting Judge Carr to characterize immaterial testimony as untrue.

In the case at bar, the trial judge would not have been permitted to tell the jury that a prosecution witness was telling the truth and that a defense witness had testified falsely. *Hicks* v. *United States*, 150 U. S. 442, at 452 (1893). *A fortiori*, petitioner was deprived of a fair trial when the prosecution called as a witness the Circuit Judge who had acted as the one-man grand jury and who had issued the warrant in this case, and caused him to tell the jury that a defense witness had testified falsely.

CONCLUSION

The right to a fair and impartial trial is guaranteed by the due process clause of the United States Constitution. When the record herein is viewed as a whole, the conclusion is inescapable that the many instances of prejudicial error at the trial were not mere errors of law, but were steps in a calculated plan which deprived petitioner of a fair and impartial trial.

The writ of certiorari should be granted.

Respectfully submitted,

EUGENE L. GAREY,
WM. HENRY GALLAGHER,
Counsel for Petitioner.

MILTON I. HAUSER,
ABRAHAM HORNSTEIN,
of *Counsel.*

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SEP 10
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 131

FLOYD FITZSIMMONS,
Petitioner and Appellant below,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent and Appellee below.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EUGENE L. GAREY,
WM. HENRY GALLAGHER,
Counsel for Petitioner.

GAREY & GAREY,
63 Wall Street,
New York 5, N. Y.,

WM. HENRY GALLAGHER,
3005 Barlum Tower,
Detroit 26, Mich.,

Attorneys for Petitioner.

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No. 131

FLOYD FITZSIMMONS,

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v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent and Appellee below.

PETITIONER'S REPLY BRIEF

The brief of the State of Michigan, hereinafter referred to as "Respondent", opposing the petition for certiorari, discloses a misconception of several of petitioner's contentions.

I

Respondent states (p. 3, footnote 4) that petitioner assumes, without proper foundation of record, that the one-man grand jury and the special prosecutor together contrived, through sensational press releases attributed to them, to deprive petitioner of his constitutional rights; and (p. 5) that petitioner did not, in either of his two motions for continuance, attempt to prove by supporting affidavits or otherwise that any of the purported statements published in the press were actually made by the one-man grand jury or by the special prosecutor.

Respondent does not assert that the quotations attributed to the one-man grand jury and his hand-picked special prosecutor were not made by them.

The undisputed fact is that many of the newspaper articles (R. 12, 22)* attribute the quotations therein to the one-man grand jury and the special prosecutor.

The issue presented by the motions for continuance because of the widespread publicity attendant upon Senator Hooper's murder, accompanied by published false and inflammatory statements and charges against the petitioner, was not whether such statements were in fact made by the one-man grand jury and the special prosecutor. The issue was whether, because of the publication and constant repetition thereof, and the attribution of such quotations to the one-man grand jury and the special prosecutor, petitioner could at such time secure a fair and impartial trial—a right guaranteed him by the Federal Constitution.

Assuming *arguendo* that the one-man grand jury and the special prosecutor did not make the statements quoted in the newspapers, the fact remains that the prejudice engendered by the publication of such statements would not thereby be lessened. The fact that such statements and quotations were attributed to them in the press greatly increased the prejudice created thereby for the following reasons:

1. Circuit (now Supreme Court) Judge Carr was conducting the one-man grand jury in Ingham County, in which county he was then and had been serving as a Circuit Judge for upwards of twenty-four years.

2. Judge Carr's activity as a one-man grand jury in Ingham County had received more publicity in the press and over the radio than had ever been given to any other investigation in Michigan.

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* A few highlights of these articles are included in the footnote commencing on page 4 of the petition for certiorari.

3. In addition to editorials and special articles which appeared in the press lauding Judge Carr and his work, his photograph, together with that of the special prosecutor (now Governor), had been published on many occasions.

4. Petitioner was tried in Ingham County.

5. Judge Carr had issued the warrant against petitioner, conducted the preliminary examination, and bound petitioner over for trial in the Circuit Court of Ingham County.

With this background of judicial service and the widespread publicity attendant upon Judge Carr's activities as the one-man grand jury in Ingham County, there was probably not a person in Ingham County who did not know or had not heard of Judge Carr. The conclusion is inevitable that statements published in the press and attributed to Judge Carr and his personally appointed special prosecutor (never denied or retracted by either of them) would be accepted as the truth by the general public and particularly the citizens of Ingham County.

To state, therefore, as respondent does, that no prejudice was created merely because petitioner did not prove that the statements and quotations, admittedly published and widely disseminated, were in fact made by the one-man grand jury and the special prosecutor, evades the realities of the situation.

The situation here presented is not one where complaint is made as to factual reporting or publicity respecting the crime upon which the accused is to be brought to trial. Here petitioner, on the eve of his trial for an alleged offer of a bribe, had been falsely accused of being connected with one of the most sensational murders ever committed. The press described the murder as "a crime unequaled in Michigan history" (R. 12). Here the accusations and innuendoes emanated from the lips of ambitious sworn ministers of justice, who at the very moment were prosecuting petitioner for another crime.

It is all very well to state that the interrogation of the jurors failed to disclose any prejudice. The fact remains, that a prejudice such as that which was deliberately and unfairly created here, can be so deep-rooted that it may be said to be prejudice *per se*. Under such circumstances, a mere denial of prejudice by a prospective juror would not eradicate a subconscious prejudice, which if it could be eradicated, could only be accomplished with the passage of time.

We respectfully submit that the circumstances established by the record herein constituted a violation of "fundamental ideas of fair play and justice in civilized society" (*In re Oliver,* 333 U. S. 257, at 282), and deprived petitioner of "that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *California,* 314 U. S. 219, at 236).

Respondent states (p. 8, footnote 8) that it cannot agree with petitioner's assertion that the sole motive of injecting Senator Hooper's name into the case during the cross-examination of petitioner was to prejudice petitioner in the eyes of the jury, by refreshing the jurors' minds, in case they might not have remembered it, that petitioner was the same Fitzsimmons whom the special prosecutor had charged in the press with having had some connection with Hooper's murder.

Although in this footnote respondent states that its reason for disagreeing with petitioner's contention will be thereafter discussed in the brief, no further mention thereof is contained therein.

If the asserted motive in injecting Hooper's name into the case was not the actual motive of the special prosecutor, then what was the motive? Respondent offers no explanation.

Notwithstanding that the trial court, during his interrogation of the jurors, stated to them (S. R. 25)

> "Mr. Hooper had nothing to do with this case at all. He is not even a witness on it",

he nevertheless permitted the special prosecutor not only to inject Hooper's name during the cross-examination of petitioner, but in addition permitted him to interrogate petitioner at length concerning his visits to Hooper after the issuance of the warrant in this case, his reasons for such visits, and concerning threats alleged to have been made by him to Hooper (R. 125-127).

That the special prosecutor's motive in injecting Hooper's name into the case and pursuing the prejudicial line of cross-examination above mentioned, was solely to prejudice petitioner before the jury, is further evidenced by the record herein.

Day after day, right up to the very morning of the trial, the newspapers quoted the special prosecutor and the one-man grand jury to the effect that Hooper was to have been "the principal witness", "the chief witness", "the star witness" against petitioner, Frank D. McKay and William Green, and that petitioner, McKay and Green had the most to gain from Hooper's murder.

Concededly, neither McKay nor Green had any connection whatsoever with this case. Nevertheless, the special prosecutor, under the guise of cross-examination, was permitted, over objection, to interrogate petitioner at great length concerning his friendship and association with McKay (R. 106-109, 117-121, 123-124) and with Green (R. 119-120). Question after question was directed to petitioner and not one of these questions related to the issues of the trial.* Not a single one of these questions could possibly have affected the witness's credibility.

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* Appellant was cross-examined concerning his reasons for visits to McKay (R. 107)—as to whether he went to see McKay as soon as he got a subpoena from the grand jury—whether he talked to McKay about the grand jury (R. 108)—whether McKay paid him any money—whether McKay had anything to do with Governor Fitzgerald's campaign (R. 109)—how many times he saw Frank McKay after he was before the grand jury (R. 117)—why he went to Grand Rapids—whether he ran errands for McKay—whether he once drove McKay's New York attorney from Lansing to Detroit and why he did that—who asked him to take McKay's counsel to

One has but to read the many pages devoted to this line of cross-examination to see that it was aimed solely at directing the jurors' attention to the oft-repeated and published false accusations that there was some sinister connection of petitioner, McKay and Green with the murder of Hooper, which false accusations the special prosecutor had himself been guilty of circulating.

If it can be assumed that the jurors could have forgotten all that they had read almost daily and right down to the very date of the trial, concerning the alleged connection of petitioner and McKay and Green with the murder of Hooper, then obviously the constant injection of the names of McKay and Green and petitioner's relationship with them—climaxed by questions concerning alleged threats against Hooper, thereby establishing a motive—would certainly bring back to the jurors' minds all the previously published false and malicious charges, statements and insinuations.

We respectfully submit that there was not, and could not have been, any other motive.

Were such tactics in accord with "fundamental ideas of fair play and justice in civilized society"? *

Did not such flagrant violation of accepted principles of law violate the principle that "due process of law requires that the proceedings shall be fair"? †

Detroit (R. 118-119)—whether McKay was interested in a totalizer concern (R. 120-121)—whether he went to Detroit just because McKay asked him to—and that McKay signed his bond (R. 124).

Appellant was also cross-examined as to whether he had been to see William Green—whether it was shortly after being before the grand jury—his reasons for going to see Green (R. 119)—what he talked to Green about—how long he knew Green—and concerning Green's position on House Bill No. 22 (R. 120).

* *Per* Rutledge, *J.*, in *In re Oliver*, 333 U. S. 257, at 282 (1948).

† *Per* Cardozo, *J.*, in *Snyder* v. *Massachusetts*, 291 U. S. 97, at 116 (1934).

II

Respondent argues that petitioner was not deprived of his constitutional right to a fair and impartial trial by the refusal of the trial court to grant him a reasonable continuance where, after the jury had been selected and sworn, the date of the commission of the alleged offense was changed from that charged in the warrant, testified to under oath at the preliminary examination, and charged in the information, and in respect of which petitioner had served a notice of alibi.

Respondent contends that petitioner failed to establish that he was prejudiced thereby.

In this connection, respondent ignores that provision of the Michigan statute * which provides that an accused is entitled to a reasonable continuance under the circumstances here presented, unless it affirmatively appears that he had not been "*misled* or prejudiced".

No answer is made by respondent to petitioner's contention that upon the facts established by the record herein, he was not only *misled,* but in fact *deliberately misled.*

Petitioner's contention in this respect is substantiated by the following undisputed facts:

1. On January 17, 1945, twelve days before the date set for trial, petitioner, in accordance with the statute,† duly filed and served a notice of alibi alleging that on February 20, 1941, the date of the alleged offense, he was not in the city of Lansing, but in the city of Grand Rapids. The notice of alibi listed the names of six witnesses whom petitioner intended to call to establish such alibi (R. 17).

2. On January 22, 1945, five days after the service of notice of alibi and one week before the commencement of the trial, the special prosecutor sent State Trooper Potter to see the witness Handy, and the conclusion was arrived at that February 20th was the incorrect date (R. 68, 77).

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* Quoted at p. 25 of petitioner's brief in support of certiorari.

† Section 17313, Compiled Laws of Michigan 1929.